

1 market to say, wait a minute, that's what we should
2 pay whether it's during war time or not during war
3 time. When it was Jean Loretto's roof as we talked
4 about, which involved cable companies, the
5 teleprompter case.

6 The Court never said, well, you were
7 paying five percent of your revenues to the building
8 owner so now if she has to allow you onto the roof
9 top, that should be the measure of just compensation.
10 The Court rejected that and no Court has ever accepted
11 that. So, what we had is a dispute that was partially
12 resolved in the APCO case as to what should the level
13 compensation be on the pole.

14 I would say in all the situations, except
15 a few, the Court has made clear that the FCC's
16 formula, payment of make-ready and the costs that are
17 fully allocated more than exceeds just compensation.
18 The one exception that Judge Tjoflat mentioned was,
19 well, there could be a problem if the pole is full.
20 If somebody else wants to come and get on the pole and
21 there's no room for them, then if you show on that
22 pole that there's this higher valued use, then you do

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1 have a taking that might require something more than
2 marginal costs. So, what we have is a particular
3 situation --

4 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Does
5 that mean something more than marginal costs or
6 something more than marginal costs plus all the add
7 ons that are under the Commission formula?

8 MR. SEIVER: You hit the area of dispute.
9 I believe from what Judge Tjoflat said, because he
10 understood that the Commission's formula granted more
11 than marginal cost. The 11th circuit it said, this -
12 the FCC's formula grants way more than marginal cost
13 and more than the minimum required for just
14 compensation. What happens is that if there is a
15 marginal cost as the basis of the minimum, all that
16 Judge Tjoflat said is, well, okay, that's minimum. I
17 don't know, sitting here today, whether what they're
18 getting is the minimum or something more than minimum.
19 I know the formula awards them more than that, but I
20 don't know.

21 So, if there is a full pole on a specific
22 pole that is full, then he said that the question

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1 would be, are they entitled to more than marginal
2 cost, and he said yes. How much more, that is what
3 the issue is that ultimately got designated for the
4 hearing and when the FCC - when the Bureau issues it,
5 it said it bears the burden of proceeding with the
6 introduction of evidence and the burden of proving it
7 is entitled to compensation above marginal costs with
8 respect to specific poles. Nobody will dispute, Gulf
9 Power may dispute with me on this, that the formula
10 and make-ready already exceeds marginal costs.

11 The other issue that I think was important
12 is where it says, specific poles. What we have is a
13 statement that only in these unusual situations are
14 they even entitled to more than marginal costs. Now
15 we didn't ask that - well, wait a minute, if the
16 minimum rate is marginal costs, should we back our
17 rent down on the 99 percent of the other poles out
18 there, down the marginal costs and stop paying all the
19 other rent that we pay and just pay the make-ready and
20 the incremental cost of handling our attachments. No,
21 we're already paying them more. If you account all
22 the make-ready and all the rent on the non-full poles,

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1 I'm not sure that they could ever get to a situation
2 where they say, we have this one pole or these two
3 poles that need to go at a higher rate. I think we
4 have an offset based on how much we pay over marginal
5 costs on the other poles.

6 Similarly, I don't think unless you have
7 proof on a pole-by-pole basis that we can meet the
8 Tjoflat test or what the Bureau said in the hearing
9 order, where it says on specific poles. That also
10 informs our procedural schedule to a degree and the
11 description of evidence because Gulf Power says they
12 don't want to put in evidence about specific poles.
13 They don't want to come in with work orders or permits
14 on a pole-by-pole basis. They want to do surveys. In
15 the constitutional jurisprudence, a taking has never
16 been proven by a survey. It's always been proven by
17 evidence specific to the piece of property that's
18 taken. Unless we have evidence on a per pole basis,
19 and I think this is going to be one of the issues
20 about how much time we need for discovery, I'm not
21 sure that we need to have the hearing.

22 I know Your Honor said this, we're not

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1 going to make a dispositive summary order today, but
2 I do think that if Gulf Power will tell us that they
3 do not intend to put in evidence on specific poles,
4 not just by surveys or some statistical analysis, that
5 we don't have any consideration of evidence that would
6 be relevant, however it would be defined, to meet the
7 test under the Tjoflat formulation in the APCO case,
8 which was the basis for the hearing designation order,
9 or the hearing designation order itself.

10 Now that said, I do understand that what
11 Gulf Power is interested in doing is making a case
12 that, no, we do have some full poles. I must say that
13 when we pay our rent, we pay only on the poles that
14 we're attached to. There's no survey done of an area
15 and say, well, you're going to be on 70 percent of
16 these poles in the survey area, so pay on 70 percent
17 of all of our poles. If we're on a pole and we didn't
18 get it permitted, they hit us with a penalty. It's a
19 per pole basis that we have for the attachment.

20 Now once Gulf Power does prove that
21 there's a particular pole that meets the test, that
22 it's full and there's somebody else that wants to get

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1 on that can't get on for whatever reasons, then we
2 would go to the next stage of saying, well, okay, what
3 are they entitled to above marginal cost. Only then
4 would perhaps a survey or some other statistical
5 evidence help in defining what the compensation is,
6 because that's what the Commission has done when it
7 sets rate.

8 For example, on telecom when it says here
9 are the average number of entities that are attaching
10 because that goes into the formula for the
11 calculation. Now, when there is a full pole, we also
12 have our point that once we get to the point that it's
13 full, that when we pay make-ready and a change out,
14 those are marginal costs that are paid. While it does
15 seem, well, what's the point of having this rule that
16 a full pole can get a higher rate if all you're going
17 to do is change it out and then it's not full anymore,
18 just goes to show that the formulation is going to
19 have very limited applicability.

20 As we see it, there could be an FAA limit
21 on the height of a pole depending on its location.
22 There might be a construction of the pole in the area

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1 where there's streetcar wires or something. We just
2 can't physically put in a taller pole. Or, there are
3 so many attachers and they're already at a 50-foot
4 pole that ten attachers on there that's it and the
5 11th - there's no 55-foot pole in inventory. So there
6 could be those rare situations. We did not see, given
7 their description of evidence, that we needed a
8 hearing at all. That's why we had our dispute with
9 the Bureau, which we lost, when they did the HDO. The
10 HDO did not say that that evidence that they described
11 was actually relevant. They left that to Your Honor.
12 I think that if we can get a preliminary indication of
13 what evidence it is they need to put on, that not only
14 will that inform our discovery and our procedural
15 schedule, but it will also inform how much discovery
16 can be had of them and because the constitutional
17 issue is lost to the owner, not what we might make as
18 profit on putting our attachments up and serving cable
19 operators. That their discovery of us, which Your
20 Honor made a mention to, did not seem relevant except
21 with respect to what our experts are relying on and
22 using and the normal.

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1 So despite Your Honor's admonition that
2 you did not want to make a preliminary ruling today,
3 we had hoped through the clarification process and
4 maybe an exchange with both Gulf Power and the
5 Commission that we could outline what kind of evidence
6 is needed because I think Gulf Power would say if they
7 have to prove it on a per pole basis, they might
8 withdraw their petition and we can move on.

9 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Well,
10 let me ask you this. That's very helpful. Thank you.
11 Let me ask this question, supposing hypothetically
12 that of a thousand poles that you were wired on, and
13 by the way, you're representing just one cable
14 company. You're an association that's representing a
15 half a dozen or so.

16 MR. SEIVER: Yes, Your Honor.

17 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Let's
18 assume hypothetically that there's a 1000 poles that
19 your clients are attached to in some way, shape or
20 form. A hundred of those it turns out, by whatever
21 form of discovery there is, but it becomes clear or
22 even Gulf Power comes through and says look we've got

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1 100 of these 1000 that are fully utilized and here's
2 the graphic evidence to show that they are fully
3 utilized and you agree that they are fully utilized.
4 The question remains to be litigated as to okay, how
5 do we get to measuring the damages. Gulf Power has
6 got two or three approaches that they want to use. I
7 don't think they've found one yet that you like. So,
8 we have to wrestle with that. Okay. Well, that's
9 clear. That clarifies the issue. We've got 100 of
10 1000 that we've got to do this with. Now what about
11 the other 900? The other 900 - again, let me assume
12 in my hypothetical, they're giving you a rate that's
13 based on the Commission formula, which is marginal
14 cost plus those few add ons. Are you interested in
15 litigating those poles, too?

16 MR. SEIVER: No, Your Honor. We've
17 already litigated those and the Commission has already
18 held that those poles are compensable at the formula
19 rate at which I believe there was a number that - I
20 can't remember if it was four or five dollars a pole,
21 that was withheld because Gulf Power wanted to charge
22 \$38 for every pole, not just the full poles. They

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1 wanted \$38 on their, I don't know if it's 200,000
2 poles or whatever the number of poles are, in their
3 service area. So that was rejected and what was with
4 upheld both in the Alabama Power proceeding as well as
5 in this Gulf Power proceeding by the Commission is
6 that, no, the formula on all the poles now except for
7 the Tjoflat poles would be at that formula rate. So,
8 we're not litigating that anymore. That issue has
9 been decided. I presume that when the whole
10 proceeding would go up for Commission or court review,
11 that maybe they would take issue with that part of it
12 then. As for right now that - your order is what
13 controls on those other 900 poles. We except that.

14 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.
15 So if I gave you interrogatories to identify each pole
16 that you contend is fully utilized and they come back
17 and they identify the poles, then you're going to ask
18 for documents to prove it and you might want to take
19 some testimony of some of their wiring experts,
20 however, to prove it, and you're convinced that, okay,
21 we're satisfied that they're full now it's just a
22 question of how much. If that's all you're asking

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1 them to do, why is there so much contention over -
2 except to the method of proof of the damages, why is
3 there so much concern about these other poles?

4 MR. SEIVER: Well, Your Honor --

5 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Before
6 you answer, let me ask this question too. You said -
7 I've seen this in the papers. The base went somewhere
8 from like \$4 to \$5 to \$38 a pole?

9 MR. SEIVER: Correct, Your Honor.

10 CHIEF ADMINISTRATIVE JUDGE SIPPEL: That
11 applies to all the poles that you're attached to?

12 MR. SEIVER: Initially that's what begat
13 the complaint was the \$38 charge for every pole.
14 There was no allegation that any one was full. They
15 just said, no, \$38 no matter what.

16 CHIEF ADMINISTRATIVE JUDGE SIPPEL: All
17 right. So, under my hypothetical, what's going on
18 here? You got a hundred poles identified as being
19 fully utilized and you know that there's a serious
20 question or issue of damages with respect to those 100
21 poles, but the other 900 poles you feel you're getting
22 charged also \$38 a pole on each of those even though

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1 those are the ones that, as far as we can tell, are
2 the ones that are under the Commission formula.

3 MR. SEIVER: Well, they can't charge us
4 \$38 for those poles or for any pole.

5 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Okay.
6 So that's not happening, am I right?

7 MR. SEIVER: No, they are not charging us
8 \$38.

9 CHIEF ADMINISTRATIVE JUDGE SIPPEL: That's
10 a relief to hear. Now the ones that you're getting
11 charged \$38 on that prompted you to bring the action,
12 the damages action, do you know which poles they are?

13 MR. SEIVER: Let me just clarify, no, we
14 do not know.

15 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Why is
16 there a mystery? Is there a bill at the end of the
17 month that says that you owe us \$38 and you must
18 multiply 38 times the number of poles? It shouldn't
19 be too hard to figure that out.

20 MR. SEIVER: They never billed us that
21 way. They billed us the \$38 for all 150,000 poles or
22 whatever we were on. That's when we brought the

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1 complaint. The complaint was resolved on the basis of
2 \$38 was not a proper rate for any pole. It was only
3 on reconsideration that Gulf Power said, well, wait a
4 minute. We want to look at what the APCO case said
5 about full poles, even though there had never been any
6 argument or any evidence about any pole that was full
7 or that only these full poles got the \$38 rate.

8 They never billed us that way. They said
9 we want to put on evidence that says these poles, our
10 poles - I think what they really want to say is all
11 their poles are full so they can get the \$38 rate on
12 every single pole.

13 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Wait,
14 how can that happen? I mean, how can you say
15 something is full when you've got a measure of damages
16 that - you in effect have won, right? You felt that
17 you had won?

18 MR. SEIVER: I thought so, Your Honor.

19 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Then
20 all of a sudden it turns out that, well, no as to the
21 full poles, you haven't won. Not because of anything
22 necessarily that the Commission did but the 11th

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1 Circuit got into the act somehow?

2 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Right,
3 Your Honor. Okay. I'm going to ask - believe me,
4 you're going to have plenty of time to talk about
5 this. So where's my train of thought here? Why is
6 there a bone of contention about \$38 on anything other
7 than poles that you can identify as being allegedly,
8 anyway, fully implemented?

9 MR. SEIVER: Because Gulf Power never
10 identified what, if any, poles are full. They wanted
11 to talk about generic evidence while we did these
12 change outs for Knology in 1998. This is also, this
13 pole complaint, was for the 2000, the 2001 timeframe.
14 This is five years ago.

15 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Thank
16 you. I'm aware of that. Thank you.

17 MR. SEIVER: Today, how a pole might look
18 is not relevant to what it looked like back then.
19 What happened was, in the description of evidence,
20 both in the petition for reconsideration, to say,
21 well, we want to be able to prove that our poles are
22 full, they didn't say on a pole by pole basis. They

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1 said we can show work orders or permits that would
2 tend to show, but they want to say all our poles are
3 full. We reserved all this space for ourselves. We
4 need it. So, every pole is full or crowded. That way
5 the just compensation rate, whatever it might be,
6 would apply to all these full or crowded poles.

7 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Are
8 you saying they took the position that they're
9 virtually all full because the ones that we actually
10 don't have physically full, we've got plans to fill
11 them soon or in the future or something like that.

12 MR. SEIVER: Exactly, precisely, Your
13 Honor. We have side issues about whether they can
14 reserve that space for themselves. There's the bona
15 fide development plan, which the Commission and the
16 11th Circuit have ruled on that you cannot
17 unilaterally just take that space for yourself. They
18 never told us what their plans are. That as long as
19 that space is not being used, we can be in there. To
20 say that that reservation of space then kicks us into
21 the just compensation rate would kind of make the
22 exceptions follow the rule so every pole is going to

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1 be full.

2 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Am I
3 correct in assuming that that issue has not been
4 resolved? That might have been one of the issues
5 under reconsideration? That issue has not been
6 resolved?

7 MR. SEIVER: That has not been resolved.

8 CHIEF ADMINISTRATIVE JUDGE SIPPEL: So
9 that's what we're here for?

10 MR. SEIVER: Correct, Your Honor. That's
11 why when we looked at this and said, now wait a
12 minute, if we look at the constitutional aspect of
13 what's the loss to the owner, not the gain to the
14 taker, the \$38 rate has nothing to do with their loss
15 as long as we pay make-ready, which is millions and we
16 pay rent. They're getting more than the marginal
17 costs and that there's no indication that what we pay
18 is somehow or other inadequate for a pole that's full
19 as well. That's what we wanted to prove and we argued
20 to the Bureau when we were arguing about the ruling.
21 I do think that there is a serious question that
22 perhaps the Court needs to resolve for us, is looking

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1 at what the FCC formula provides as far as
2 compensation versus what the actual cost are of
3 allowing us so that we can say, okay, if they've got
4 to get more than marginal cost, is the range
5 encompassed by the top end of the cable formula, which
6 is what we're paying. Nobody disputes that that's
7 what we're paying. The make-ready plus fully
8 allocated costs, carrying charges, maintenance
9 expenses, and a profit. Their profit is built in.
10 There is a profit element that is built in. So, it is
11 not just cost recovery but it's the ability to earn
12 money on those costs. Now if we do that, I think that
13 Your Honor would be able to say, well, all right, this
14 proceeding was very interesting. We've looked at
15 this. This is the way it is going to be for you,
16 APCO. What Gulf Power will say is then, we don't get
17 anymore than what the formula is, and I see that,
18 well, that's just the way it is. Because more than
19 marginal cost doesn't mean more than the formula, more
20 than marginal costs means more than make-ready. Since
21 they are already getting considerably more on these
22 allegedly full poles, if we pay for a change out,

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1 that's no cost to them that's our cost. I think we
2 have to add up all of the costs that we do pay to see
3 if, in fact, they somehow or other are being under
4 compensated. I don't think Gulf Power wants to go
5 that route. That's been our big bone of contention,
6 why we did the clarification and why when we tried to
7 negotiate it Your Honor directed us to try to
8 negotiate the aspect of the clarification so it could
9 be moved or withdrawn. We weren't able to make much
10 progress because of the three main issues. They told
11 us they did not want to make a per pole showing. They
12 did not want to agree that the FCC's formula was
13 already more than marginal cost. They wanted to start
14 from the FCC formula and go above that. They did not
15 want to necessarily limit themselves to the 2000 to
16 2001 timeframe. They wanted discovery from us and the
17 aspect of the loss to the owner was not going to
18 govern them. They wanted to use these other
19 methodologies such as replacement cost, a new one that
20 I had not heard of until I saw this, this federal
21 concessions leasing model or reproduction costs, which
22 has to do with entire pole networks not the little one

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1 foot of space. So, we ended up at an impasse. We did
2 have a discussion. We were at an impasse. We could
3 not really inform the Court of where we were going to
4 go because these are the critical issues that
5 generated the complaint, generated the
6 reconsideration, put us in the 11th Circuit in the
7 APCO case and were ones that we were not going to
8 agree. We were going to stand our ground and not do
9 that. Even though we think ours are justified by the
10 loss to the owner and the per pole standard, I'm not
11 sure that Gulf Power is ready to agree with that.

12 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Thank
13 you very much. I'm beginning to understand now why
14 I'm here this morning.

15 MR. LANGLEY: Your Honor, I'm Eric Langley
16 from Gulf Power.

17 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Mr.
18 Langley.

19 MR. LANGLEY: If you accept what Mr.
20 Seiver says as true, then the APCO, the FCC decision
21 has no meaning. If you accept what he says as true,
22 then the hearing designation order has no meaning.

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1 One thing that I think that we would both agree on is
2 that APCO and the FCC, the controlling decision in
3 this case about when a pole is full or when it is
4 crowded and when a utility is entitled to something
5 higher than, as we say the cable rate or as they say
6 marginal costs, is very nuance. It is not a cut and
7 dry easy to understand opinion. I believe that that
8 is one of the reasons that the FCC has referred this
9 to Your Honor for consideration. It is not just the
10 matter of applying a standard that everyone agrees
11 upon. I think one of the things that you'll be called
12 upon to do is to bring to life a very difficult to
13 understand standard the 11th Circuit has given us.

14 For example, when is a pole full? When is
15 a pole crowded? Is crowding the same thing as being
16 full? One thing that we would never agree on and Your
17 Honor asked Mr. Seiver questioned earlier about this
18 is when a pole actually is full. They would argue
19 that even a pole with 30 attachments on it can still
20 have cross arms as long as there's proper guiding. We
21 say as a matter of engineering and practicality that
22 that's not the case. So there are a handful of

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1 operational issues that are going to come into play in
2 this proceeding. Frankly, probably more than any of
3 the parties want or intend. The operational issues,
4 the color of the analysis here, are going to be
5 inevitable.

6 With respect to our burden in terms of
7 what we have to show, is it a pole AQ421, pole AQ412
8 type of analysis? I really hope that it's not because
9 I don't think that's what the 11th Circuit had in
10 mine. Gulf Powers pole network, while one of the
11 smaller networks in the southern systems, still has
12 somewhere between 275 and 300,000 poles, most of which
13 have some sort of attachment be it joint user, be it
14 a telecom company or be it a cable company.

15 See, I remember ADMINISTRATIVE JUDGE STREIBER this
16 morning that the number was around 138,000. I'm not
17 sure who was using it. I'm sorry. Let me finish
18 that. That would be an issue in this case. That
19 would have to do with the complaint, not your whole
20 network.

21 MR. LANGLEY: Your Honor has raised a very
22 good point and that is we don't actually know exactly

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1 how many attachments are on our poles. This goes back
2 to the operational issues. A lot of times they'll get
3 on our poles and won't tell us. Mr. Seiver was
4 referring to penalties earlier. One of the instances
5 in which we impose penalties is when the cable company
6 goes out, sees what they think is open space on a
7 pole, gets on and doesn't tell us. So one of the
8 things we're going to ask for in discovery is your
9 facilities maps. I know it sounds strange but
10 truthfully, we do not know where all of the poles are.
11 Excuse me, where all their --

12 CHIEF ADMINISTRATIVE JUDGE SIPPEL: You
13 know where all your poles are?

14 MR. LANGLEY: We do.

15 CHIEF ADMINISTRATIVE JUDGE SIPPEL: You
16 don't know -- now for 138,00 poles -- well, that's a
17 lot of poles from where I'm sitting. 138,000 poles
18 that I'm figuring you got on some kind of a computer
19 program, that you don't know what's on them?

20 MR. LANGLEY: That is correct. We do not
21 know what is on each and ever pole.

22 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Would

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1 they be out in some rural area that - how does that
2 happen?

3 MR. LANGLEY: Sometimes they're in rural
4 areas; sometimes they're in urban areas. A lot of this
5 goes back to the voluntary access regime. It frankly
6 was a more open system. There was more cooperation but
7 the utilities always have the right to deny access if
8 it might more since. I don't know how many instances
9 that has occurred because prior to 1996, you've got to
10 remember that technology was different. Now, with
11 technology advancing, there are some financial motives
12 for utilities to deny access to these parties. That's
13 one of the reasons that Congress stepped in to create
14 this system. One of the other things they did in 1996
15 though that we think is very important in this
16 proceeding is create two different rates. One, the
17 cable rate, which they insist upon, continue the
18 subsidized regulatory scheme that had been in place
19 since the 1970s.

20 Your Honor has raised a very good point.
21 That is we don't actually know exactly attachments are
22 on our poles. This goes back to the operational

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1 issues.

2 A lot of time they'll get on our poles and
3 won't tell us. Mr. Seiver was referring to penalties
4 earlier and one of the times - one of the instances in
5 which we imposed penalties is when the cable company
6 goes out, sees what they think is open space on a pole,
7 gets on and doesn't tell us.

8 So one of the things we are going to ask
9 for in discovery is your facilities maps.

10 I know it sounds strange but truthfully, we
11 do not know where all of their poles are. Where all of
12 their attachments are.

13 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Where
14 all your - you know where all your poles are?

15 MR. LANGLEY: We do.

16 CHIEF ADMINISTRATIVE JUDGE SIPPEL: But you
17 don't know - now for 138,000 poles, now that's a lot of
18 poles - from my - where I'm sitting.

19 But 138,000 poles and I am figuring you got
20 it on some kind of a computer program that you don't
21 know what's on them?

22 MR. LANGLEY: That is correct, we do not

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1 know what is on each and every pole.

2 CHIEF ADMINISTRATIVE JUDGE SIPPEL: Where
3 would they - would they be out in some rural area that
4 - I mean how does that happen?

5 MR. LANGLEY: Sometimes they're rural areas,
6 sometimes they're urban areas and a lot of this goes
7 back to the voluntary access.

8 It frankly was a more open system. There
9 was more cooperation. The utilities always have the
10 right deny access if it made more sense.

11 I don't know how many instances that has
12 occurred, because prior to 1996 - you've got to
13 remember that technology was different.

14 Now, with technology advancing there are
15 some financial motives for utilities to deny access to
16 these parties.

17 That's one of the reasons that Congress
18 stepped in to create this system.

19 One of the other things they did in 1996
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